

## Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

### Part 2—Individual Motions

#### 6.24 Motion to Dismiss Because of Double Jeopardy— Multiple Punishments for the Same Offense

Insert the following language at the top of page 57, immediately before Section 6.25:

Convictions for both felony-murder and the underlying felony violate the prohibition against double jeopardy. Where the defendant was convicted of assault with intent to commit armed robbery and the defendant's felony-murder conviction was based on the same assault conviction, the defendant's conviction and sentence for the underlying felony must be vacated. *People v Akins*, \_\_\_ Mich App \_\_\_, \_\_\_ (2003).

## 6.28 Motion to Suppress the Fruits of Illegal Police Conduct

Insert the following case summary on page 64 after the first paragraph:

Marijuana plants growing in a shed behind the defendant's house were inadmissible at trial because although the marijuana plants were in plain view from the police officer's vantage point in the defendant's backyard, the officer's entry into the defendant's backyard was unlawful. *People v Galloway*, \_\_\_ Mich App \_\_\_, \_\_\_ (2003).

In *Galloway, supra*, police officers entered the defendant's backyard after receiving an anonymous tip that marijuana was being grown there, and a police helicopter flew over the property and reported seeing pots and potting material in the defendant's yard. *Galloway, supra* at \_\_\_. In response to the defendant's assertion that the plain-view exception did not justify the warrantless search, the prosecution contended that the police officers—via their initiation of the “knock and talk” procedure—were lawfully in the defendant's backyard when they saw the marijuana plants in the defendant's shed. *Galloway, supra* at \_\_\_.

The Court of Appeals, first noting that the ordinary rules governing police conduct apply to circumstances surrounding a “knock and talk,” explained the proper execution of the “knock and talk” procedure:

“Generally, the knock and talk procedure is a law enforcement tactic in which the police, who possess some information that they believe warrants further investigation, but that is insufficient to constitute probable cause for a search warrant, approach the person suspected of engaging in the illegal activity at the person's residence (even knock on the front door), identify themselves as police officers, and request consent to search for the suspected illegality or illicit items.” *Galloway, supra* at \_\_\_, quoting *People v Frohriep*, 247 Mich App 692, 697 (2001).

The Court further stated that the police officers' claim that they were lawfully in the defendant's backyard by virtue of their “knock and talk” approach constituted a misuse of the tactic:

“[T]he knock and talk visit can[not] be used as the premise for a warrantless entry of the backyard area of [a] defendant's home [and the warrantless entry cannot then] justify the seizure of evidence under the plain view exception to the search and seizure warrant requirement.” *Galloway, supra* at \_\_\_.

In *Galloway, supra*, the Court concluded that the police officers did not conduct a “knock and talk”—rather, the officers bypassed the *front* door to the defendant's home and walked directly into the defendant's *backyard* where the marijuana plants were visible. *Galloway, supra* at \_\_\_. The plain-view

exception to the warrant requirement permits an officer to seize contraband in plain view only when the officer is lawfully in the position from which he or she sees the item, and only when the item itself is obviously incriminating. *Galloway, supra* at \_\_\_\_\_. If an officer has gained the position unlawfully, the plain-view exception does not apply. In *Galloway, supra*, the police officers' entry into the defendant's backyard was not lawful, and the plain-view exception did not apply to the marijuana plants seized from a shed in the defendant's yard. *Galloway, supra* at \_\_\_\_\_.

## 6.37 Motion to Suppress Evidence Seized Without a Search Warrant

### 3. Seizure of Items in Plain View

Insert the following text after the partial paragraph at the top of page 91:

Where police officers failed to justify their warrantless entry into a defendant's backyard under a "knock and talk" theory, the plain-view exception to the warrant requirement does not apply to the officers' seizure of contraband from a shed in the defendant's backyard. *People v Galloway*, \_\_\_ Mich App \_\_\_, \_\_\_ (2003). According to the Court, the officers did not attempt to "knock and talk" to the defendant—rather, the officers bypassed the defendant's *front* door and walked directly into the defendant's *backyard*. *Galloway, supra* at \_\_\_. Because the officers were not lawfully in the defendant's backyard, the plain-view exception did not apply to the marijuana plants in the defendant's shed. *Galloway, supra* at \_\_\_. The Court explained:

"Knock and talk, as accepted by this Court in [*People v* ]*Frohriep* [247 Mich App 692 (2001)], does not implicate constitutional protections against search and seizure because it uses an ordinary citizen contact as a springboard to a consent search. Fourth Amendment rights may be waived by a consent to search.

"This case does not fit within the knock and talk framework. Helicopter surveillance coupled with ground law enforcement movement directly into the backyard of a private home is not an ordinary citizen contact. The knock and talk in this case is more aptly characterized as an investigatory entry of the back area of defendant's home. Such investigatory entry by law enforcement fails Fourth Amendment safeguards.

"Moreover, the alleged knock and talk was not used as a springboard to secure defendant's permission for a search. Instead, it was used as a springboard to a plain view exception to the warrant requirement. This certainly is not the constitutional framework in which this Court accepted knock and talk in *Frohriep*. A predicate to the plain view exception is that the police have the right to be in the position to have that view." *Galloway, supra* at \_\_\_ (internal citations omitted)."